

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EDUARDO CARIAS, on behalf of ) Case No. 07-0083 SC  
himself and all others similarly )  
situated, ) ORDER GRANTING  
 ) DEFENDANT LSI TITLE  
Plaintiffs, ) COMPANY'S MOTION FOR  
 ) SUMMARY JUDGMENT  
v. )  
 )  
LENOX FINANCIAL MORTGAGE )  
CORPORATION; LSI TITLE COMPANY; and )  
DOES 1 through 25, )  
 )  
Defendants. )  
\_\_\_\_\_ )

**I. INTRODUCTION**

This matter comes before the Court on the Motion for Summary Judgment ("Motion") by the defendant LSI Title Company ("LSI" or "Defendant"). See Docket No. 24. Plaintiff Eduardo Carias filed an Opposition and LSI submitted a Reply. See Docket Nos. 65, 71. The Court previously denied a Motion for Partial Summary Judgment submitted by the defendant Lenox Financial Mortgage Corporation ("Lenox"). See Docket No. 91. For the following reasons, the Court GRANTS LSI's Motion.

**II. BACKGROUND**

Lenox, a loan broker, aired the following advertisement on the radio: "If you're paying a single dime at closing when you refinance your home or purchasing [sic] a new one, it's too much.

1 . . . We'll pay for your appraisal, title, escrow, everything. .  
2 . ." Plaintiff heard this and refinanced his home-loan with  
3 Lenox. Included in the closing costs was a lender's title  
4 insurance premium. Notice of Removal, Docket No. 1, Ex. A  
5 ("Compl.") ¶ 16. LSI, a title agent, provided this title  
6 insurance. Mot. at 4. LSI issued the lender's title insurance  
7 policy to Lenox in the amount of \$288,000 and LSI charged a rate  
8 of \$350 for this policy. Id.

9 Plaintiff alleges that the new loan provided by Lenox was  
10 substantially different than what had been initially promised. In  
11 particular, Plaintiff alleges that Lenox had represented that the  
12 new loan would have a monthly payment of \$993.95 per month with no  
13 negative amortization and that Plaintiff would pay no closing  
14 costs. In actuality, Plaintiff alleges that he was charged \$444  
15 in closing costs and that in order to maintain an interest-only  
16 loan with no negative amortization, he needed to pay \$1,796.04 per  
17 month. This figure is not only substantially greater than the  
18 \$993.95 that Plaintiff alleges Lenox initially offered, but this  
19 amount is also more than what Plaintiff had previously been paying  
20 on his monthly payments for his pre-existing, interest only loan.  
21 Finally, Plaintiff alleges that by the second month of the new  
22 loan, the interest rate was adjusted significantly upward.

23 Plaintiff then filed the present class action in California  
24 state court, alleging breach of fiduciary duty, violations of  
25 California's Business and Profession's Code, fraud, and violation  
26 of the Federal Real Estate Settlement Procedures Act ("RESPA"), 12  
27 U.S.C. § 2601 et seq. Defendants timely removed the case to

1 federal court. See Docket No. 1. Plaintiff's claim against LSI  
2 is centered on the allegation that LSI provided Lenox with  
3 discounted title insurance premiums in exchange for business  
4 referrals from Lenox.

5  
6 **III. DISCUSSION**

7 Entry of summary judgment is proper "if the pleadings, the  
8 discovery and disclosure materials on file, and any affidavits  
9 show that there is no genuine issue as to any material fact and  
10 that the movant is entitled to judgment as a matter of law." Fed.  
11 R. Civ. P. 56(c). "Summary judgment should be granted where the  
12 evidence is such that it would require a directed verdict for the  
13 moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250  
14 (1986). Thus, "Rule 56(c) mandates the entry of summary judgment  
15 . . . against a party who fails to make a showing sufficient to  
16 establish the existence of an element essential to that party's  
17 case, and on which that party will bear the burden of proof at  
18 trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In  
19 addition, entry of summary judgment in a party's favor is  
20 appropriate when there are no material issues of fact as to the  
21 essential elements of the party's claim. Anderson, 477 U.S. at  
22 247-49.

23 LSI has moved for summary judgment on all four of Plaintiff's  
24 claims. The Court addresses each in turn.

25 **A. Breach of Fiduciary Duty**

26 Plaintiff does not allege that LSI breached its fiduciary  
27 duty. Instead, Plaintiff argues that LSI "aided, abetted, agreed  
28

1 and conspired with the Lenox Defendants in committing breach of  
2 fiduciary duty . . . ." Compl. ¶ 31.

3 To allege a claim for civil conspiracy, a plaintiff must  
4 present "evidence of three elements: (1) the formation and  
5 operation of the conspiracy, (2) wrongful conduct in furtherance  
6 of the conspiracy, and (3) damages arising from the wrongful  
7 conduct. As is well established, civil conspiracy is not an  
8 independent tort." Kidron v. Movie Acquisition Corp., 40 Cal.  
9 App. 4th 1571, 1581 (Ct. App. 1995).

10 Plaintiff has produced evidence indicating that LSI gave  
11 favorable rates to Lenox in an effort to ensure that Lenox did not  
12 take its business to a competitor of LSI. For example, Plaintiff  
13 has presented evidence that the CEO of Lenox had told LSI that LSI  
14 had to match the rates of a competitor, which at the time were  
15 between \$325 and \$450, if LSI wished to continue to do business  
16 with Lenox. See Levy Decl. Ex. 12, Dep. of Lenox CEO Wesley  
17 Hoaglund, at 94-96. Plaintiff, however, has presented no evidence  
18 that LSI intended to help Lenox breach a fiduciary duty owed by  
19 Lenox to Plaintiff. "The sine qua non of a conspiratorial  
20 agreement is the knowledge on the part of the alleged conspirators  
21 of its unlawful objective and their intent to aid in achieving  
22 that objective." Id. at 1582 (internal quotation marks omitted).  
23 As Plaintiff has presented no evidence that LSI had any knowledge  
24 of or intent to aid Lenox's alleged breach of fiduciary duty, the  
25 Court GRANTS LSI's Motion for Summary Judgment on Plaintiff's  
26 First Cause of Action for Breach of Fiduciary Duty.

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1           **B.   Violations of California Business and Professions Code**

2           Plaintiff's Second Cause of Action contains no factual  
3           allegations that LSI violated California Business and Professions  
4           Code section 17200 and 17500. These allegations are directed  
5           solely against Lenox. The Court therefore GRANTS LSI's Motion for  
6           Summary Judgment on Plaintiff's Second Cause of Action.

7           **C.   Fraud**

8           Plaintiff's Third Cause of Action alleges that Lenox made  
9           "false, deceptive, and misleading" statements regarding  
10          Plaintiff's new home-loan. Compl. ¶¶ 39, 40. Plaintiff makes no  
11          allegations against LSI regarding fraudulent conduct. LSI's  
12          Motion for Summary Judgment on Plaintiff's Third Cause of Action  
13          for fraud is therefore GRANTED.

14          **D.   Real Estate Settlement Procedures Act**

15          Plaintiff's Fourth Cause of Action alleges that both  
16          Defendants violated RESPA. In particular, Plaintiff alleges that  
17          LSI and Lenox agreed that LSI would charge Lenox discounted title  
18          insurance premiums and in exchange Lenox would refer title  
19          business to LSI.

20          Section 2607(a) of RESPA states, in part, the following:

21                 No person shall give and no person shall  
22                 accept any fee, kickback, or thing of  
23                 value pursuant to any agreement or  
24                 understanding, oral or otherwise, that  
25                 business incident to or a part of a real  
26                 estate settlement service involving a  
27                 federally related mortgage loan shall be  
28                 referred to any person.

26          12 U.S.C. § 2607(a). RESPA also provides that "[a]ny person . . .  
27          who violates the prohibitions . . . of this section shall be

1 jointly and severally liable to the person . . . charged for the  
2 settlement service involved in the violation . . . ." Id. §  
3 2607(d)(2). Title insurance is a "real estate settlement  
4 service." 12 U.S.C. § 2602(3). "Thing of value" is broadly  
5 defined and includes "discounts, . . . the opportunity to  
6 participate in a money-making program, . . . [and] services of all  
7 types at special or free rates." 24 C.F.R. § 3500.14(d). The  
8 term "payment" is synonymous with "the giving or receiving of any  
9 'thing of value' and does not require transfer of money." Id.  
10 "An agreement or understanding for the referral of business  
11 incident to or part of a settlement service need not be written or  
12 verbalized but may be established by a practice, pattern, or  
13 course of conduct." Id. § 3500.14(e). "When a thing of value is  
14 received repeatedly and is connected in any way with the volume or  
15 value of the business referred, the receipt of the thing of value  
16 is evidence that it is made pursuant to an agreement or  
17 understanding for the referral of business." Id.

18 Plaintiff's RESPA claim fails for a number of reasons. To  
19 begin, Plaintiff alleges that he was charged the \$350 title  
20 insurance premium. Line 1108 of Plaintiff's Settlement Statement  
21 reads "Title Insurance to LSI \$350." Spencer Decl. Ex. A,  
22 ("Settlement Statement"). The amount of \$350 appears in a column  
23 titled "Paid from Borrower's Funds at Settlement." Id. Thus,  
24 argues Plaintiff, he was in fact "charged for the settlement  
25 service involved in the violation." 12 U.S.C. § 2607(d)(2). It  
26 is undisputed, however, that Lenox reimbursed Plaintiff for this  
27 charge and that this reimbursement appears on the very same  
28

1 Settlement Statement. See Settlement Statement. LSI argues, and  
2 the Court agrees, that because Plaintiff was reimbursed, he was  
3 not actually "charged" this fee.

4 Plaintiff, in the alternative, argues that even if he were  
5 never directly charged a fee, he nonetheless ultimately paid the  
6 costs of the refinance through a higher-interest rate mortgage.  
7 In support of this argument, Plaintiff looks to the Order of a  
8 district court in Georgia, which held the plaintiff in that case  
9 had "incurred the charge for the services in question because she  
10 was given a higher interest rate over the life of the loan."  
11 McWhorter v. Ford Consumer Fin. Co., 33 F. Supp. 2d 1059, 1067  
12 (N.D. Ga. 1997). In McWhorter, however, "the undisputed evidence  
13 indicate[d] that the higher 1% interest rate that Plaintiff was  
14 charged on her loan, over its life, would have equaled the 4% fee  
15 that Defendant . . . paid at closing." Id. Thus, there was  
16 concrete and undisputed evidence that the defendant had  
17 manipulated the plaintiff's loan so that the closing costs were in  
18 fact embedded in the interest rate.

19 In the present case, however, Plaintiff has presented no  
20 evidence that would create any nexus between the insurance premium  
21 fee and the rate of his loan. Instead, Plaintiff has made the  
22 conclusory allegation that he "paid all of the costs of the  
23 refinance, including LSI's title premiums, through higher  
24 interest." Opp'n at 16. Such an allegation, without  
25 substantiating evidence, is simply too tenuous to withstand a  
26 motion for summary judgment.

27 Whether the refinance transaction between Lenox and Plaintiff  
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involved abuses, as Plaintiff alleges, is one question. Whether Plaintiff was injured, or even affected, by the discounted rates LSI allegedly offered Lenox is something else altogether. Even if Plaintiff's theory that he was eventually forced to repay this title insurance fee through the higher interest rates of his loan were viable, Plaintiff still has produced no evidence that this was the case in the present action. In short, the transaction between LSI and Lenox is irrelevant to Plaintiff's lawsuit.

For these reasons, LSI's Motion for Summary Judgment on Plaintiff's Fourth Cause of Action is GRANTED.

**IV. CONCLUSION**

For the reasons stated above, LSI's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

Dated: February 8, 2008



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UNITED STATES DISTRICT JUDGE